BANK KERJASAMA RAKYAT MALAYSIA BHD

v.

YM TUNKU MARYAM TUNKU ZAINAL ABIDIN & ANOR

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 22-13-94]
8 JUNE 2000

LAND LAW: *Sale of land - Auction - Shortfall sum - Proceeds of sale insufficient to satisfy outstanding amount owed to plaintiff bank - Claim for shortfall sum - Claim also for increase thereof from date of order for sale until hearing date - Whether claim for increase allowed*

EVIDENCE: *Presumption - Evidence Act 1950, s. 114(e) - Presumption that judicial and official acts regularly performed - Validity of foreclosure proceedings - Whether presumption applicable*

The 1st defendant defaulted in her monthly repayment instalments of a loan of RM250,000 taken with the plaintiff bank for the purpose of purchasing a sub-lease in a property ('the property'). The property was charged as security for the said loan. The plaintiff commenced foreclosure proceedings and an inquiry was held under s. 261 of the National Land Code 1965 ('NLC'). At the conclusion of the inquiry, the district land administrator made an order ('the order') that the property be sold by public auction. The amount outstanding inclusive of interests in the said order was RM591,680.50. At the public auction the property was sold for RM200,000. The amount remitted to the plaintiff was only RM195,287.80 after a deduction of RM4,712.20 was made. As such, there was still an outstanding amount owed by the defendants to the plaintiff, *ie*, a shortfall which allegedly increased to RM999,964.39 at the time of the trial. The plaintiff claimed for the said amount.

The defendants disputed the amount claimed and counterclaimed, *inter alia*, that the sale by public auction declared null and void and the 1st defendant's registered interest in the said property as a sub-lessee be reinstated.

Held:

[1] The plaintiff failed to convince the court how it arrived at the figure of RM999,964.39 as being the outstanding amount. The plaintiff nevertheless succeeded in proving on a balance of probabilities a part of the amount claimed, *ie*, that at the time the order was issued, the amount outstanding was RM591,680.50.

[2] The onus lay on the party impugning the order to explain in what way the order was not valid. It was not the duty of the plaintiff who proved the existence of the order to prove that every step in the foreclosure proceedings in the National Land Code 1965 was duly complied with.

[3] The carrying out of the inquiry was a quasi-judicial act and the carrying out of the public auction was an official act pursuant to the NLC. As such, this court was entitled to invoke the presumption under s. 114(e) of the Evidence Act 1950 and to presume (unless it was proved to the contrary) that every step in the foreclosure proceedings was duly complied with.

[4] Unless and until the order, was successfully challenged by the defendants, either by way of appeal under s. 418 NLC, *certiorari*, or declaration, this court must give respect and recognition to the order.

[5] The amount owing to the plaintiff was RM591,680.50. The property sold for RM200,000, left a shortfall of RM391,680.50. The sum of RM4,712.20 deducted from the proceeds of the sale in the absence of any explanation to the contrary, should not have been deducted. Thus, the whole sum of RM200,000 should be credited to the account of the 1st defendant. Accordingly, the plaintiff's claim against the 1st defendant was allowed only to the extent of RM391,680.50.

[6] The plaintiff's claim against the 2nd defendant was dismissed as the plaintiff failed to prove that the 2nd defendant being a guarantor was served with a notice of demand.

[7] The district land administrator who issued the order and who played a significant role in the inquiry and the public auction should have been made a party to the defendants' counterclaim. So too, the purchaser of the property as any decision made by this court on the declaration sought might adversely affect it.

[7a] There was a long delay in applying for the declaration. As the granting of the declaration is a discretionary remedy, the court may refuse to grant a declaration if there has been a long delay in applying for such relief.

[7b] In relation to the issue that the plaintiff did not serve the 1st defendant with the Form 16D, the 1st defendant was deemed to have acquiesced to that failure. This was because she did not attend the inquiry that was held wherein she could have raised the said issue. Based on the above, the counterclaim should be dismissed.

[Plaintiff's claim against the 1st defendant allowed to the extent of RM 391,680.50. Counterclaim dismissed with costs.]

Case(s) referred to:
Eshak Sa'ad v. Meriam Sa'at [1975] 2 MLJ 97 ***(refd)***
Executive Aids Sdn Bhd v. Kuala Lumpur Finance Bhd [1991] 3 CLJ 1766 ***(refd)***
Jagdeo v. Bulaki, 68 IC 226 ***(refd)***
Kailash Chand Gaggar v. State of Assam [1993] (2) Crimes 700 ***(refd)***
Majumdar v. AG of Sarawak [1967] 1 MLJ 101 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 73A, 114(e)
National Land Code 1965, ss. 33, 261(1)(c), 263, 265(1)(b), 264(4), 266, 268, 418
Rules of the High Court 1980, O. 15 r. 3

Other source(s) referred to:
Sarkar on Evidence, 1999, 15th edn, pp 1659, 1660, 1663

For the plaintiff - Adi Satria (Rozakiah with him); M/s Mohd Akhir & Partners
For the defendants - Saranjit Singh; M/s KS Narayanan Assocs

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:

In this writ action the plaintiff bank, Bank Kerjasama Rakyat Malaysia, claims against the defendants for a shortfall sum of RM999,964.39 (the amount owing as of 1 June 1998).

In 1985 the first defendant, YM Tunku Maryam, applied for a loan of RM250,000 from the plaintiff for the purpose of purchasing a sublease in an immovable property – a shop-house ('the said property'). The loan was approved in August the same year.

The sublease which, in the event, was registered in the name of the first defendant, was then charged to the plaintiff bank as security for the loan.

The second defendant, Encik Shamsuddin, who is the husband of the first defendant, stood as guarantor for the loan.

The amount of RM250,000 (*ie*, the amount under the loan) was disbursed by the plaintiff towards the purchase of the property.

Subsequently, the first defendant defaulted in the monthly repayment instalments. The plaintiff commenced foreclosure proceedings. An inquiry under s. 261 of the National Land Code (read together with s. 33 of the Code) was held on 11 February 1992. At the conclusion of the inquiry, the district land administrator (the 'PTD') ordered that the said property be sold by public auction in accordance with s. 263 of the National Land Code (hereinafter

referred to as the 'NLC' or the 'Code'). The amount outstanding inclusive of interest as stated in the order dated 11 February 1992 (P20) was RM591,680.50.

A public auction was held by the PTD on 25 June 1992 and the land was sold for RM200,000.

Of this amount, after deducting expenses, a sum of RM195,287.80 was credited into the loan account of the first defendant. But the crediting of this amount was only effected on 28 February 1993 (about a year from the date of the order), when the plaintiff received the sum of RM195,287.80 from the PTD. By then (28 February) the outstanding amount had, allegedly, swelled from RM591,680.50 (as stated in the PTD's order of 11 February 1992) to RM743,506.45. After crediting the amount of RM195,287.80, there was still an outstanding balance, that is to say, still a shortfall of RM548,218.65.

By the time of the trial (24 November 1997), the shortfall had increased and by 1 June 1998 it had increased from RM548,218.65 to RM999,964.39 (although the trial actually commenced on 24 November 1997, Encik Mazlan bin Mohammad (PW1), an executive of the plaintiff bank, who testified on behalf of the plaintiff bank at the continued hearing on 1 June 1998, gave this amount of RM999,964.39 as being outstanding on 1 June 1998).

The first and second defendants, in evidence, admitted to obtaining the loan, charging the property, and defaulting in repayment but –

(a) disputed the amount claimed by the plaintiff as owing; and

(b) disputed the validity of the foreclosure proceedings.

The second defendant, in addition to (a) and (b) above also alleged that, as a guarantor, he was not issued with a notice of demand.

Both the defendants have filed a counterclaim praying, *inter alia* –

(a) for a declaration that the sale by public auction carried out by the PTD on 25 June 1992 is null and void; and

(b) that the PTD reinstates her registered interest in the property as a sub-lessee.

I have given judgment for the plaintiff in respect of a part of the amount claimed and have dismissed the defendants' counterclaim with costs.

I find that the plaintiff bank has failed to convince the court how it arrived at the figure RM999,964.39 as being the outstanding amount, as of 1 June 1998. PW1, whose was charged by the plaintiff bank with the responsibility of

enforcing the collection of debts from defaulting borrowers, was not able to explain the inconsistencies between the two statement of accounts submitted to the court, namely, P13 and P15; nor did he bring the ledger to court although the plaintiff had been issued by the defence with a notice to produce the ledger.

Be that as it may, I find that the plaintiff has, nevertheless, succeeded in proving on a balance of probabilities a part of the amount that it is claiming. The plaintiff has adduced before me credible evidence in the form of an order (P20) of the PTD made under s. 263 of the NLC that proved that, at the time the order was issued by the PTD, the outstanding amount was RM591,680.50. That such an order was made is not disputed by the defendants (nor is the admissibility of P20 disputed; only its validity is disputed – but I will touch on this issue of validity later in this judgment).

In law, the amount stated in P20 is the amount the first defendant owes the plaintiff – the chargee. Section 263 of the NLC states:

> 263. Order for sale, and matters to be dealt with thereby.
>
> (1) At the conclusion of any enquiry under section 261, the Land Administrator shall order the sale of the land or lease to which the charge in question relates unless he is satisfied of the existence of cause to the contrary.
>
> (2) Every order shall be in Form 16H, and shall –
>
> (a) provide for the sale to be by public auction;
>
> (b) specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;
>
> (c) *specify the total amount due to the chargee at the date on which the order is made*; and
>
> (d) fix a reserve price for the purpose of the sale, being a price equal to the market value of the land or lease in question as estimated by the Land Administrator. [Italics are mine.]

But it is the contention of the defence that the order was not valid on the grounds that Form 16D (P10) was not served on the first defendant, the chargor, and that Form 16G (P16) (declaration by the chargee) is irregular in that it does not contain the date and address of service of Form 16D. The plaintiff's witnesses (PW1 and PW2) maintained that Form 16D was served but the defence contended that their evidence on the question of service was inadmissible by reason of non-compliance with s. 73A of the Evidence Act.

In my judgment, once the order P20 is produced by the plaintiff and on the face of it is neither defective nor irregular, then the onus lies on the party impugning the order to explain in what way it can be said that the order was not valid. It is not the duty of the plaintiff, who has proved the existence of

the order (apart from having proved the granting of the loan, the charging of the property, the disbursement of the amount borrowed, the default in repayment, and the commencement of foreclosure proceedings) to go on to prove that every step in the procedure as prescribed in the National Land Code relating to the foreclosure proceedings that preceded the issuance of P20 has been duly complied with. It must be reiterated here that the present case is not a charge action and that the first defendant is not asked in the present proceeding to show cause why an order for sale should not be made. She had already been given the opportunity to show cause at the inquiry before the PTD. The present case is only a claim for the shortfall sum.

As far as the plaintiff is concerned, it needs only to produce the order (and this they did by tendering in evidence P20). Now, it must be pointed out and appreciated that the carrying out of the inquiry by the PTD was a quasi-judicial act and the carrying out of the public auction by the PTD was an official act, conducted pursuant to the National Land Code. This being the case, the court was entitled to invoke s. 114(e) of the Evidence Act 1950 – and it did so invoke. Section 114(e) of the Evidence Act states that –

> 114. Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> (a) ...
>
> (e) that judicial and official acts have been *regularly performed*. [Italics are mine.]

The rule embodied in this illustration is a particular application of the maxim "*omnia praesumuntur rite esse acta*", *ie*, all acts are presumed to have been rightly and regularly done. (*Sarkar on Evidence*, 15th edn, 1999 p. 1659.)

"Regularly performed" means performed with due regard to procedure (*Sarkar on Evidence* p. 1663 citing *Jagdeo v. Bulaki*, 68 IC 226).

The basis of the presumption is that normally courts of justice uphold official and judicial and other acts rather than render them inoperative. The presumption arises wholly on grounds of public policy (*Sarkar on Evidence*, p. 1660 citing *Kailash Chand Gaggar v. State of Assam* [1993] (2) Crimes 700, 702 (Gau)).

Thus, based on the above authority, this court is entitled to presume (unless it is proved to the contrary) that every step in the foreclosure procedure as prescribed by the National Land Code had been duly complied with by the

PTD. In short, there is a presumption of validity of the sale, including the order for sale. This presumption may be rebutted. But the burden was on the defendants to rebut by adducing evidence showing that the official acts (the issuing of the order for sale and the carrying out the sale) were not regularly performed.

In the present case, in the light of P20 and the presumption under s. 114(e), I do not think that the issues as to whether or not Form 16D has been served on the chargor or that the declaration in Form 16G (P16 – unlike P10, the admissibility of this document does not appear to have been disputed by the defence) omitted to state the address and date of the service of Form 16D are really material or relevant. In my view, unless and until that order (the existence of which, as I have said, is not in dispute) is successfully challenged by the defendants (either by way of appeal under s. 418 of the NLC or *certiorari* or declaration), this court must respect and give effect and recognition to the order. And the order states clearly that at the time it was issued by the PTD, the outstanding amount was RM591,680.50. It is of no use for the defendants to come to this court and complain that the plaintiff could not adduce admissible evidence to prove due service of Form 16D; or that they have not been served with the same; or that the declaration in Form 16G is improper. They must challenge the validity of P20 – which they had not done, except for the counterclaim. And, except for the counterclaim in which a declaration is sought to declare the sale of the property by the PTD null and void, an issue which I shall allude to and deal with in detail in due course, the fact remains that, hitherto, the order (P20) has never **previously** been challenged either by way of appeal under s. 418 of the NLC or by way of *certiorari* or by way of a declaration.

Now, it shall be recalled that the amount owing to the plaintiff as stated in the order P20 is RM591,680.50. As the property was sold by public auction at the price of RM200,000, this amount must be credited into the account of the first defendant thereby leaving a shortfall of RM391,680.50 (RM591,680.50 – RM200,000).

I am mindful of the fact that of the sum of RM200,000, the amount remitted to the plaintiff bank by the PTD was only RM195,287.80. Thus, there was a deduction of RM4,712.20 by the PTD. The plaintiff gave no explanation for the deduction. Probably this deduction was made for the miscellaneous purposes as allowed by s. 268 of the NLC. Be that as it may, in view of the absence of any explanation I do not propose to deduct the sum of RM4,712.20 from the proceeds of the sale. The whole sum of RM200,000 should, therefore, be credited to the account of the first defendant.

According I allowed the plaintiff's claim against the first defendant (YM Tunku Maryam) with costs but only to the extent of RM391,680.50 (RM591,680.50 – RM200,000). This is the only amount that the plaintiff has proved.

However, I am dismissing the plaintiff's claim with costs as against the guarantor, the second defendant (Shamsuddin). The plaintiff has failed to prove that the second defendant, being a guarantor, has been served with a notice of demand, as required in the circumstances of the present case.

Now, moving on to the counterclaim in which, by way of seeking a declaration, the defendants challenged the validity of P20, it is my judgment that it must be dismissed with costs.

The legal burden is on defence to prove on a balance of probabilities the existence of facts on which they rely (e.g. the non-service of Form 16D) upon as forming the basis of their contention that the order was invalid. He who alleges must prove his allegation.

In other words, it is not for the plaintiff to prove that the plaintiff bank or the PTD has complied with all the procedures leading to the public sale of the property as prescribed by the National Land Code. As I have held, in order to prove the existence of a part of the debt all the plaintiff needs to do is to tender the order for sale.

But in dismissing the defendants' counterclaim I do not think that I need to venture into the evidence of the defendants. I need not go that far. For the counterclaim could be dismissed merely on the following reasons.

First, the PTD who issued P20 and who conducted the inquiry and the public sale of the property had not been made a party to the proceeding by the defendants in their counterclaim. Legally, this public official should be made a party to the counterclaim as a defendant in accordance with O. 15 r. 3 of the Rules of the High Court 1980. He played a significant role in the inquiry and the public auction. After the initial application for the sale of the land by the chargee/plaintiff (under s. 260 of the NLC), it was the PTD who conducted the inquiry as required by s. 262 of the Code. It was the PTD who had caused a summons to be served on the first defendant (the chargor) to appear at the inquiry, in accordance with s. 261(1)(c) of the NLC. In accordance with s. 263 of the NLC, it was the PTD who decided at the conclusion of the enquiry that an order for sale be issued; and it was the PTD who carried out the sale as prescribed by s. 265 of the NLC. It was also the PTD who decided on the reserve price.

It will, therefore, be observed that, under the Code, the chargee only applies that the charged property be sold, but thereafter the PTD takes charge of the matter. The person who makes the inquiry and the consequential order

for sale is the PTD: the chargee has no control over the property or the public sale. The chargee cannot direct the PTD on how to carry out the inquiry or the sale. The PTD takes no instruction from the chargee. The duty of the PTD is to carry out the sale in the manner as prescribed by the provisions of the Code. The Code gives the PTD the power to postpone the sale if he thinks it expedient (see s. 264(4)). Indeed, the Code, by specifically providing that the chargee is entitled to bid at the sale (see s. 265(1)(b)), implies that, as far as the order for sale is concerned, it treats the chargee just like any ordinary member of the public. The insignificance of the role of the chargee (and conversely the importance of the role of the PTD) is further emphasised by the fact that s. 266 stipulates that in the event the chargor decides to pay the amount as specified in the order (that is to say, the amount owing to the chargee), with the view of aborting the sale, it is to the PTD that such payment be made: not to the chargee.

Moreover, in the light of para. 19 of the statement of defence, the PTD would be directly affected by the declaratory order sought by the defendants (if the Court were to grant the declaratory order). In the circumstances, it is unfair not to make the PTD a party to the action.

In *Majumdar v. AG of Sarawak* [1967] 1 MLJ 101 the court enunciated the principle that a declaration should not be made concerning persons interested but not joined as parties.

Second, and applying the same principle as stated above, the purchaser of the property (that is to say the successful bidder at the public auction), Corporate Avenue Sdn. Bhd., had also not been made a party to this proceeding. It is not clear from the evidence as to whether this company, pursuant to the successful bidding, is now the new registered owner of the sublease. But it is entitled to and in the normal course of events would be registered as the new owner of the sublease. Thus any decision made by this court on the declaration sought may adversely affect Corporate Avenue being the purchaser. Accordingly, it should have been made a party.

Third, there has been a very long delay in applying for the declaration. As the granting of a declaration is a discretionary remedy, the court may refuse to grant a declaration if there has been a long delay in applying for such relief (*Eshak Sa'ad v. Meriam Sa'at* [1975] 2 MLJ 97). Although P20 was issued in 1992, the counterclaim was only filed on 3 December 1997 – a delay of about five years (the original statement of defence filed in 1994 did not contain the counterclaim). In fact the application by the defendants for the amendment to the statement of defence to include the counterclaim was only filed after the trial of the action had commenced on 22 November 1997. The first defendant states in her evidence that she became aware of the sale only in

1994 after the plaintiff had filed the action. Assuming she were to be believed, why did she apply for the amendment only in December 1997? She has not accounted for the long delay.

Fourth, both PW1 and PW2 (Encik Mohd Rejab, the plaintiff's solicitor) testified that an inquiry (as part of the foreclosure proceeding) was held at the PTD's office on 11 February 1992. Notice of the inquiry issued by the PTD to the plaintiff was produced as P19. This evidence including the admissibility of P19 was never challenged or disputed by the defence. Although these witnesses never said anything about the attendance of the first defendant at the inquiry, it may be presumed (invoking s. 114(e) of the Evidence Act) that the holding of the inquiry was regular in that the PTD had duly summoned the first defendant (in accordance with s. 261(1)(c)) to attend the hearing. In the absence of evidence to the contrary, it is to my mind fair to infer that the first defendant did have knowledge of the inquiry. There is no evidence that the first defendant attended the inquiry. But the first defendant never denied either in the pleading or in evidence that such an inquiry was held. She also did not deny receiving any summons to attend the inquiry; nor did she deny attending the inquiry. Indeed, the first defendant in her evidence never said anything about the inquiry at all. The proper inference to be made is that she deliberately did not attend the inquiry. And if it may be presumed that that she was duly summoned to attend the inquiry, the question then arises as to why she did not attend the inquiry and raise the issue about not being served with Form 16D (P10) or about the irregularity of Form 16G (P16). That would have been the appropriate forum to raise the issue. Now, having failed to raise the issue at the inquiry, when she had every opportunity to do so, the first defendant must be deemed to have acquiesced to the failure on the part of the chargee to have her served with Form 16D – if at all there had been such failure; or to the irregularity in Form 16G (P16). In *Executive Aids Sdn Bhd v. Kuala Lumpur Finance Bhd* [1992] 1 MLJ 89 Lim Beng Choon said (at p. 94):

> Any defects in the procedure adopted by the chargee in his application for an order of sale, which must include defects in the charge itself, should be raised at the inquiry held by the Land Administrator.

Then at p. 95 the learned judge went on to say:

> I repeat under the scheme of the NLC all questions should be raised at the Land Administrator's enquiry and the chargee or chargor cannot be allowed to reopen the enquiry of the Land Administrator by bringing in a matter which the party concerned had failed to do so at the beginning.